

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**G.C., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
U.S. BUREAU OF CITIZENSHIP &  
IMMIGRATION SERVICES, Ontario, CA,  
Employer**

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**Docket No. 12-1551  
Issued: November 20, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 7, 2012 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated May 31, 2012 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than 180 days has elapsed between the last merit decision dated July 2, 2010 and the filing of this appeal on July 7, 2012, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**FACTUAL HISTORY**

Appellant, a 49-year-old customs supervisor, filed a claim for benefits on January 6, 1994, alleging that he injured his lower back while getting up from his chair on January 5, 1994. OWCP accepted the claim for lumbosacral sprain. Appellant returned to full duty on March 25, 1994.

On January 25, 2010 appellant filed a Form CA-2a, claim for benefits, alleging that he sustained a recurrence of disability which was causally related to his accepted January 1994 employment injury.

By letter to appellant dated May 17, 2010, OWCP requested additional factual and medical information in support of his claim for recurrence of disability.

By decision dated July 2, 2010, OWCP denied appellant's claim for a recurrence of disability, finding that he failed to submit medical evidence sufficient to establish that his alleged recurrence of disability was caused or aggravated by the January 1994 employment injury.

By letter dated December 26, 2011, appellant requested reconsideration. He submitted an April 14, 1994 physical therapy note, a May 23, 1994 physical therapy report and one page from an October 7, 1994 lumbar magnetic resonance imaging (MRI) scan report.

By decision dated May 31, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>1</sup> does not entitle an employee to a review of an OWCP decision as a matter of right.<sup>2</sup> This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on h[er] own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, it has stated that a claimant may obtain review of the merits of a claim by (1) showing that OWCP erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by OWCP, or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. See 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(b).

this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).<sup>5</sup>

In those cases, where a request for reconsideration is not timely filed, the Board had held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error presented in the untimely request.<sup>6</sup> OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.<sup>7</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>12</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>13</sup> The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on July 2, 2010. Appellant requested reconsideration on December 26, 2011; thus, the request is untimely as it was outside the one-year time limit.

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<sup>5</sup> See cases cited *supra* note 2.

<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, *supra* note 2.

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 2.

<sup>14</sup> *Gregory Griffin*, *supra* note 2.

The Board finds that appellant's December 26, 2011 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP and must raise a substantial question as to whether OWCP was correct in denying appellant's alleged recurrence of his accepted condition in January 2010. The evidence appellant submitted is not sufficient to shift the weight of the evidence in favor of appellant. The physical therapy reports appellant submitted do not constitute medical evidence under section 8101(2) of FECA and are therefore of no probative value. The partial MRI scan report dated October 7, 1994 was submitted previously and does not contain any medical opinion relevant to the pertinent issue of whether appellant sustained a recurrence of disability in 2010 which was causally related to his accepted January 1994 employment injury. Appellant did not submit any evidence with his request for reconsideration, which would establish that he sustained a compensable recurrence of disability. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

### **CONCLUSION**

The Board finds that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error. OWCP properly denied further review on May 31, 2012.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 31, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board